

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
The Honorable James L. Robart

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KATHERINE MOUSSOURIS, HOLLY  
MUENCHOW, and DANA PIERMARINI, on  
behalf of themselves and a class of those  
similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Case No. 2:15-cv-01483-JLR

**MICROSOFT'S LOCAL RULE 7(g)  
SURREPLY SEEKING TO STRIKE  
PORTIONS OF PLAINTIFFS' REPLY  
BRIEF AND ACCOMPANYING  
DOCUMENTS**

1        This Court should strike the following material submitted in connection with Plaintiffs'  
 2 Class Certification Reply, Dkt. 342. *See* L.R. 7(g).

3        **I. Exhibit A to, and Paragraph 5 of, the Declaration of Anne Shaver (Dkts. 343,  
 4 343-1)** constitute improper legal argument beyond the Court-ordered page limit.

5        **II. Dr. Ryan's Reply Report (Dkt. 345)** is not responsive to a competing expert report  
 6 and therefore does not constitute a "rebuttal" report as permitted by the Federal Rules  
 and this Court's order

7        **III. Footnote 35 of Plaintiffs' Reply (Dkt. 342)** makes assertions regarding alleged pay  
 8 discrepancies without any evidentiary support.

9        **I. Exhibit A To, And Paragraph 5 Of, The Shaver Declaration Constitute  
 10 Impermissible Legal Argument Beyond The Court-Ordered 25 Page Limit.**

11      Following extensive negotiations between the parties, this Court approved Plaintiffs'  
 12 request to expand the page limit for their class certification reply from 12 pages to 25. *See*  
 13 Dkt. 108 at 2; L.R. 7(e)(3). Exceeding this allotment, Plaintiffs improperly attached to their  
 14 attorney declaration a 10-page chart of legal argument and included impermissible legal  
 argument in the declaration itself. Shaver Decl., Dkt. 343; Ex. A., Dkt. 343-1.

15      Declarations "should not be used to make an end-run around the page limitations ... by  
 16 including legal arguments outside of the briefs." *King Cty. v. Rasmussen*, 299 F.3d 1077, 1082  
 17 (9th Cir. 2002) (affirming motion to strike).<sup>1</sup> Shaver Exhibit A does just that. Even the chart's  
 18 title shows it is legal argument: "Microsoft's alleged variation in the pay and promotion  
 19 process is not material and/or is not supported by the evidence it cites to." Dkt. 343-1 at 1.  
 20 Exhibit A articulates point-by-point Plaintiffs' arguments in response to assertions in  
 21 Microsoft's Opposition. As just one example, Plaintiffs argue (wrongly) that one declarant's  
 22 testimony "reflects the common problem in the system" and so supports certification. *Id.* at 3.  
 23 Accordingly, this Court should strike Exhibit A. The chart is also misleading and inaccurate  
 24 because it quotes statements out of context, ignores relevant evidence, and contradicts

25  
 26      <sup>1</sup> *See also, e.g., Silver v. Exec. Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 731 n.2 (9th Cir. 2006);  
 27 *Singh v. Soraya Motor Co.*, 2017 WL 4843598, at \*4 (W.D. Wash. Oct. 26, 2017); *Sierra Club v. BNSF Ry. Co.*,  
 28 2017 WL 3141899, at \*1 (W.D. Wash. July 25, 2017); *Rinky Dink Inc. v. Elec. Merch. Sys. Inc.*, 2014 WL  
 5880170, at \*4 n.1 (W.D. Wash. Sept. 30, 2014); *GemCap Lending, LLC v. Quarles & Brady, LLP*, 269 F. Supp.  
 3d 1007, 1026 (C.D. Cal. 2017); *Apple, Inc. v. Samsung Elecs. Co.*, 2014 WL 252045, at \*10 (N.D. Cal. Jan. 21,  
 2014).

1 Plaintiffs' own arguments.

2 Likewise, paragraph 5 of the Shaver Declaration—in which Plaintiffs impugn Lane  
 3 Powell's representation of putative class member declarants (a firm not counsel to Microsoft  
 4 here)—should be stricken as improper legal argument beyond the Court-ordered 25-page limit.

5 **II. The Ryan Report Should Be Stricken As An Improper Reply Report.**

6 The scheduling order in this case only permits Plaintiffs to submit “rebuttal” expert  
 7 reports. Dkt. 226 at ¶ 8. Under Federal Rule of Civil Procedure 26(a)(2)(D)(ii), a rebuttal  
 8 report is appropriate only if it is “intended solely to contradict or rebut evidence on the same  
 9 subject matter” submitted by an opposing party’s expert under Rule 26(a)(2)(B) or (C).  
 10 Plaintiffs acknowledge that Microsoft offered no expert to oppose Dr. Ryan, so there is  
 11 nothing to rebut. Dkt. 340 at 4. (“Microsoft leaves Dr. Ryan’s opinions *unrebutted*, offering  
 12 no expert opinion opposing hers.”). Calling the report a “reply” does not save it, as there is no  
 13 such thing as a “reply report” under the Rules. *See K&N Eng’g, Inc v. Spectre Performance*,  
 14 2011 WL 13131157, at \*9 (C.D. Cal. May 12, 2011) (“[N]either this Court’s Scheduling  
 15 Order, nor the Federal Rules of Civil Procedure permit ‘reply’ reports.”).

16 A party cannot “offer testimony under the guise of ‘rebuttal’ only to provide additional  
 17 support for his case in chief.” *Cage v. City of Chi.*, 2012 WL 5557410, at \*2 (N.D. Ill. Nov.  
 18 14, 2012). A rebuttal report must respond to “an opposing party’s expert.” *Theoharis v.*  
 19 *Rongen*, 2014 WL 3563386, at \*1 (W.D. Wash. July 18, 2014); *Tuuamalemalo v. Las Vegas*  
 20 *Metro. Police Dep’t*, 2017 WL 1550235, at \*1 (D. Nev. Apr. 28, 2017) (rebuttal reports must  
 21 “refute the previous expert’s conclusions.”). Because Dr. Ryan does nothing to advance  
 22 Plaintiffs’ case and, if anything, supports Microsoft’s position, *see* Dkt. 286 at 20, it did not  
 23 offer any expert in response to Dr. Ryan. And Plaintiffs used Dr. Goldberg to rebut Microsoft  
 24 expert Rhoma Young. Dkt. 346. Where the opposing party does not “offer an expert witness  
 25 in his opposition, there is nothing to ‘rebut’” and the reply report should be stricken. *Johnson*  
 26 *v. Hartford Cas. Ins. Co.*, 2017 WL 2224828, at \*3 (N.D. Cal. May 22, 2017); *cf. Smart Skins*  
 27 *LLC v. Microsoft Corp.*, 2016 WL 4148091, at \*2 (W.D. Wash. July 1, 2016); *Fed. Trade*  
 28 *Comm’n v. Amazon.com, Inc.*, 2016 WL 4154284, at \*1 (W.D. Wash. Feb. 9, 2016).

1 Just as Dr. Ryan's initial report demonstrates why commonality does not exist, so too  
 2 does her improper "reply." As she opines, Microsoft's performance review standards are "ill-  
 3 defined and/or *not defined to a common standard* related to the job requirements of each job."  
 4 Dkt. 345 at 1 (emphasis added). This, she explains, "reinforces [her] conclusion that *common*  
 5 *criteria are not applied consistently* by the reviewing managers." *Id.* (emphasis added).  
 6 While the report only provides further support for Microsoft's opposition to class certification,  
 7 it is nonetheless improper rebuttal and should be stricken.

8 **III. Footnote 35 Of Plaintiffs' Reply Should Be Stricken Because It Lacks Any  
 9 Evidentiary Foundation.**

10 Footnote 35 of Plaintiffs' Reply states: "Plaintiffs observed in the data produced by  
 Microsoft that Class members witnesses have been paid less than comparable male  
 11 coworkers." Dkt. 340 at 17 n.35. As Microsoft noted in its Opposition, the Rules of Evidence  
 12 apply at class certification. Dkt. 286 at 31 n.21. Yet, Plaintiffs offer no evidence or citation  
 13 for their conclusory statement in Footnote 35. Allegations unsupported by evidence should be  
 14 stricken and disregarded by the Court. *See e.g., Redwind v. W. Union, LLC*, 2016 WL  
 15 1732871, at \*5 (D. Or. May 2, 2016) (striking where "[plaintiff did] not sufficiently lay an  
 16 evidentiary foundation for her assertion"); *Wilbur v. City of Mount Vernon*, 2012 WL 600727,  
 17 at \*2 (W.D. Wash. Feb. 23, 2012) (court will not consider unsupported arguments); *Semper v.*  
 18 *JBC Legal Grp.*, 2005 WL 2172377, at \*4 n.4 (W.D. Wash. Sept. 6, 2005) (same).

19 Microsoft has no way to know how Plaintiffs allegedly reached this conclusion and no  
 20 way to test the methodology behind it. Microsoft's expert Dr. Saad explained how Plaintiffs'  
 21 declarants were not generally paid less or promoted less frequently than what Plaintiffs' own  
 22 expert's model predicted. Dkt. 286 at 37-38 & n.31; Dkt. 290 at ¶¶ 39-43, 47-49; Appx. 1 at  
 23 pp.1-2. But Plaintiffs offer no evidence or explanation whatsoever for their statement, much  
 24 less a comparable expert conclusion. Accordingly, Footnote 35 should be stricken.

25 **CONCLUSION**

26 The Court should strike the improper material Plaintiffs submitted in or with their Reply.

1 Dated: February 14, 2018

ORRICK, HERRINGTON & SUTCLIFFE LLP

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

By: /s/ Mark S. Parris

/s/ Lynne Hermle

/s/ Jessica R. Perry

---

Mark S. Parris (WSBA No. 13870)

mparris@orrick.com

701 Fifth Avenue  
Suite 5600  
Seattle, Washington 98104  
Telephone: +1-206-839-4300  
Facsimile: +1-206-839-4301  
Attorneys for Defendant

Lynne C. Hermle (Admitted Pro Hac Vice)  
lchermle@orrick.com

Jessica R. Perry (Admitted Pro Hac Vice)  
jperry@orrick.com

1000 Marsh Road  
Menlo Park, California 94025  
Telephone: 650-614-7400  
Facsimile: 650-614-7401

Dated: February 14, 2018

MICROSOFT CORPORATION

By: /s/ David Howard

---

David Howard (WSBA No. 45211)  
Corporate Vice President and Deputy General  
Counsel, Litigation  
dhoward@microsoft.com

1 Microsoft Way  
Redmond, Washington 98052  
Telephone: +1-425-704-768

**CERTIFICATE OF SERVICE**

I hereby certify that on February 14, 2018, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

DATED: February 14, 2018 ORRICK, HERRINGTON & SUTCLIFFE LLP

By: s/Mark S. Parris  
Mark S. Parris (WSBA No. 13870)  
mparris@orrick.com

701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
Telephone: 206-839-4300  
Facsimile: 206-839-4301